88-2067

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RICHARD E. LEACH, M.D.,
Petitioner
v.

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2,
d/b/a EAST JEFFERSON GENERAL HOSPITAL, *et al.*,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case involves an initial summary suspension of a physician from the medical staff of a public hospital, and the subsequent conversion of that suspension into an expulsion from the medical staff. It involves the following questions:

1. Can a public hospital convert a summary suspension of a member of the medical staff to an expulsion without notice to the physician and an oppportunity for him to be heard?

2. What process of law is due a physician who has requested the opportunity to establish that the basis for temporary suspension of staff privileges is no longer present?

3. Does a public hospital's failure to follow its established rules and regulations concerning a summary suspension of staff privileges violate the Due Process Clause of the Fourteenth Amendment?

LIST OF PARTIES

1. Petitioner: Richard E. Leach, M.D. (Plaintiff-Appellant, below)

2. Respondents: Jefferson Parish (Louisiana) Hospital District No. 2 d/b/a East Jefferson General Hospital, and Peter J. Betts, President and Chief Executive Officer.

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The petitioner, Richard E. Leach, M.D., plaintiff-appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 19, 1989, affirming the judgment of the United States District Court for the Eastern District of Louisiana entered on August 4, 1988.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is set forth as *Leach v. Jefferson Parish Hospital District No. 2, etc., et al.* F.2d (5th Cir. 1989) (Appendices A-B, pp. 1a-9a). The opinion of the United States District Court for the Eastern District of Louisiana is not reported (Appendices C-E, 10a-20a).

GROUND UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was rendered on April 19, 1989. Jurisdiction to review the judgment by Writ of Certiorari is conferred by 28 U.S.C. 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C. 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Health Care Quality Assurance Act of 1986, 42 U.S.C. 11112:

"§ 11112. Standards for professional review actions.

(a) In general

For purposes of the protection set forth in section 11111 (a) of this title, a professional review action must be taken—

(1) in the reasonable belief that the action was in furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after

such other procedures as are fair to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating—

(A) (i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B) (i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B)—

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)—

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved;

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right—

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right—

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations of health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as—

(1) requiring the procedures referred to in subsection (a)(3) of this section—

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may reresult in an imminent danger to the health of any individual."

Constitution of the United States, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Fourteenth Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case was decided in the trial court on cross motions for summary judgment. The facts are not seriously contested.

Dr. Richard E. Leach is a board certified gastroenterologist licensed to practice medicine in the State of

Louisiana. Dr. Leach was a member in good standing of the medical staff of East Jefferson Hospital. On or about December 16, 1986, Dr. Leach received notification from R. Douglas Morgan, M.D., that his staff privileges at the Hospital had been summarily suspended. Pursuant to relevant provisions of the Medical Staff Bylaws, Dr. Leach requested a hearing on that matter before the Executive Committee of the Medical Staff. On January 27, 1987 the hearing was conducted and on January 30, 1987 Dr. Leach was informed that the Executive Committee had upheld his summary suspension.

Pursuant to the Medical Staff Bylaws, Dr. Leach requested an appellate review of the suspension by the Board of Directors of East Jefferson General Hospital. On February 18, 1987, the Board of Directors conducted its appellate review and, by correspondence dated February 23, 1987, Dr. Leach was informed that the Board of Directors had upheld the summary suspension.

Some four months later, through correspondence dated May 19, 1987, Dr. Leach contacted Peter Betts, President and Chief Executive Officer of the hospital and Herbert Marks, Chief of the Medical Staff, advising them of his desire "to exercise his right to determine if the Executive Committee will lift the suspension of December 16, 1987". Additionally, counsel retained by Dr. Leach made similar requests. In response, Dr. Marks notified Dr. Leach that there was no provision in the bylaws to reinstate a suspended physician once that suspension had been approved by the board of the hospital and, further, Dr. Marks noted that the Board's decision took precedence over that of the Medical Executive Committee. On behalf of the Medical Executive Commitee, Dr. Marks denied the request that the summary suspension matter be placed on the agenda of the Medical Committee.

On June 2, 1987, Dr. Leach received correspondence from Mr. Betts informing him that his request had been discussed with Dr. Marks. On June 17, 1987, Mr. Betts

informed Dr. Leach that on June 9, 1987, the Medical Executive Committee had reviewed his request for delineation of the requirements necessary for the lifting of the summary suspension and that the committee had applied a "long-standing policy" which required a member of the medical staff "who had either failed to obtain membership on original application or who had lost membership on the medical staff" to wait one year before making reapplication. Further, Mr. Betts advised Dr. Leach that under the Executive Committee's interpretation of this rule, the one year moratorium began when the board of the Hospital ratified the suspension on February 19, 1987. Thus, Mr. Betts required Dr. Leach to reapply for staff privileges and deprived him of an opportunity to present evidence that the suspension should be lifted.

On March 16, 1987, Dr. Leach had been informed that the Louisiana State Board of Medical Examiners had appointed an examining committee of physicians to conduct an examination of Dr. Leach's fitness and ability to practice medicine. That inquiry resulted from Dr. Marks' letter of March 9, 1987 to the State Board alleging that Dr. Leach was an impaired physician. After conducting a thorough review, including the examination of Dr. Leach by three psychiatrists selected by the State Board of Medical Examiners, the State Board notified Dr. Leach that it had considered the matter at its August 19-20, 1987 meeting and that the State Board had closed the matter and that there would be no further action. The psychiatrists appointed by the board concluded that Dr. Leach was free from any appreciable mental disease and should be able to practice medicine with reasonable judgment and skill and safety to his patients. The Board of Medical Examiners had considered these findings and concluded that there was insufficient evidence to suspend or restrict Dr. Leach's license to practice medicine and, therefore, considered the matter "closed".

Based upon these findings, Dr. Leach again requested that the hospital lift the suspension in place or, at a minimum, provide him with an opportunity to submit evidence to establish that there was no basis for the continuation of the suspension. Those requests and supporting documentation were contained in correspondence of September 9, 1987 from counsel which was addressed to Robert H. Murphy, then Chairman of the Board of Directors of East Jefferson Hospital. Dr. Leach complained that the hospital's treatment of his summary suspension as an expulsion violated the rules and procedures of the Medical staff and the hospital, and further constituted a federal civil rights violation. He further complained that denial of his reinstatement had caused him substantial financial damage in that the facility constituted his largest base for patient referrals in his subspeciality of gastroenterology.

In response, on September 23, 1987 Mr. Betts advised Dr. Leach that he would be required to submit a "new application" for staff membership. Mr. Betts' letter was the first written notification that Dr. Leach's suspension had been converted to an expulsion from the Medical Staff. No prior notice had been provided nor had he been provided an opportunity for hearing of his expulsion.

Due to serious financial constraints on his practice, in January, 1988, Dr. Leach reapplied for staff privileges, reserving all rights. Although Mr. Betts told Dr. Leach he would only ask for updated information to complete his application, Dr. Leach experienced months of delays in the reprocessing of his application. Those responses came back without qualification and Dr. Leach's staff privileges were reinstated on July 26, 1988, more than ten months from the notification to the hospital that the State inquiry had been closed. The hospital's conduct was the very thing Dr. Leach was concerned about when he rejected the offer to "reapply for privileges" which had been extended in September of 1987.

The nature of the inquiry conducted by East Jefferson Hospital was not merely that of a facility attempting to obtain an update on Dr. Leach's status, but was a searching inquiry which treated Dr. Leach as though he had never practiced medicine in a hospital nor had contributed to the hospital's mission of providing excellent care, facts the hospital cannot support.

REASONS FOR GRANTING THE WRIT

I. The Rulings of the District Court and the Court of Appeals for the Fifth Circuit Are Directly Contrary to This Court's Decision in *Board of Curators v. Horowitz.*

This Court in *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), held that the failure of an institution to follow previously established procedural rules would weigh heavily in the determination of whether an individual had been treated in such an arbitrary manner as to constitute a denial of due process.

The Respondents in this matter clearly failed to follow their established rules in two ways. They not only treated Dr. Leach's summary *suspension* from staff privileges as an *expulsion* from the staff, but also arbitrarily imposed a one year waiting period before he would be allowed to present evidence that the basis for the summary suspension had been resolved.[1] Their failure to follow their

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[1] This one year waiting period was ultimately shortened by the hospital's Medical Executive Committee, but instead of allowing Dr. Leach to present evidence that the basis for the summary suspension had been resolved, the defendants required him to submit a completely new application for staff privileges. Consideration of that application was considerably delayed, but Dr. Leach's staff privileges were reinstated on July 26, 1988, more than ten months after the hospital was notified that the State inquiry had been closed.

established rules in these two ways is compelling evidence of the fact that Dr. Leach has been treated in such an arbitrary manner that his rights to due process of law have been denied by the Respondents.

It should be emphasized that the claims of Dr. Leach in connection with this litigation do not concern the summary suspension of his medical staff privileges imposed on December 16, 1987, but rather focus on the fact that the Respondents, without notice to Dr. Leach or providing him an opportunity to be heard, transformed the temporary suspension of his staff privileges to an expulsion and, simultaneously, imposed a one-year period during which Dr. Leach would not apply for new staff privileges.

The initial summary suspension was authorized by Article VII, Section 2 of the Medical Staff Bylaws, which provide that certain people on the staff of the hospital "shall each have the right, whenever action must be taken immediately in the best interest of patient care in the hospital, to summarily suspend all or any portion of the clinical privileges of a practitioner." (Appendix F). Paragraph b of that Section provides that the practitioner may appeal the summary suspension of staff privileges to the Executive Committee of the Medical Staff. Paragraph c provides for a further appeal to the Board of Directors of the hospital.

The appropriate procedures were followed in regard to this *suspension* and, even though Dr. Leach does not agree with the substantive determination of the Petitioners in this regard, he does not seek judicial review of the substantive determination relating to his summary suspension. Petitioner recognizes the line of cases from the Fifth Circuit (and other circuits) which grant judicial deference to a hospital governing board in making such decisions.

But the judicial deference granted to hospital governing boards has not been an absolute grant of immunity to

such boards or an abrogation of judicial oversight. The judiciary in such cases "is charged with a narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered." *Sosa v. Board Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971.) The deference granted has been in large part due to the judiciary's lack of medical expertise, but the courts have "require[d] that procedures employed by the hospital are fair, that the standards set by the hospital are reasonable, and that they have been applied without arbitrariness and capriciousness." *Laje v. Re Thomason General Hospital*, 564 F.2d 1159, 1162 (5th Cir. 1977).

But Petitioner's recognition that the judiciary must grant deference to the Respondents as to his temporary suspension does not mean that the subsequent actions of the Respondents, in giving Dr. Leach neither notice of their planned actions nor an opportunity to be heard in opposition to their actions, are entitled to judicial deference. Indeed, the teaching of *Horowitz* is exactly the opposite: if the Respondents failed to follow their own previously established procedural rules (by refusing to ignore the clear distinction drawn by those rules between a summary suspension and an expulsion from the medical staff and by imposing an arbitrary one year moratorium on his application for staff privileges), that fact is strong evidence that Dr. Leach has been treated in such an arbitrary manner as to deny him his rights to the process of law which is due to him.

A. *The Respondents failed to follow their own Bylaws by unilaterally transforming the summary suspension of Dr. Leach's staff privileges into an expulsion of him from the staff.* The Bylaws clearly draw the distinction between a summary suspension and an expulsion from the medical staff, and provide for different procedures to be used for each. As pointed out above, Article VII, Section

2 of the Medical Staff Bylaws (Appendix F, p. 21a), authorize specified personnel to impose a summary suspension of a physician's medical staff privileges "whenever action must be taken immediately in the best interest of patient care in the hospital". Section 2 also sets forth the procedures for appealing such a suspension to the medical executive committee.

Section 1 of that same article, however, speaks to the *expulsion* of a person with staff privileges from membership on staff. A proposed *expulsion* under Section 1 brings into play a different panoply of procedures, including the appointing of an ad hoc committee which has the power to require the physician to undergo mental and/or physical examinations. The ad hoc committee is to act "with all deliberate speed" to review the relevant data, inform the affected individual of the actions the ad hoc committee will recommend, and report its findings and recommendations to the medical executive committee.[2]

The distinction is clear in the By-laws and is a logical one: a hospital needs processes by which it can not only remove someone from its staff permanently (Section 1), but also temporarily suspend that person's privileges (Section 2). The provisions of Section 2 obviously are for those instances when immediate action must be taken to protect patient care. By contrast, a permanent removal from staff under Section 1 can be accomplished only by appointing a special ad hoc committee to investigate the situation, including ordering physical and/or mental examinations. Section 2 is by its nature an emergency measure, when there is no time for deliberation

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[2] A third category for removal of medical staff privileges is contained in Section 3, referred to as "Automatic Suspension". A temporary suspension can be automatically imposed when a practitioner is delinquent in completing medical records. Furthermore, action by the State Board of Medical Examiners revoking or suspending a physician's license automatically suspends that physician's hospital privileges.

without potentially compromising patient care. Section 1, because it involves the possible permanent removal of the physician from staff privileges, is by its nature a deliberative measure, and requires a more thorough investigation by a five person ad hoc committee whose membership is specified in the text of the Section.

There is absolutely nothing in the By-laws which would prohibit a suspension under Section 2 from being coupled with the invocation of the Section 1 expulsion procedures in an appropriate situation. The simple fact is that the Respondents never invoked the Section 1 expulsion procedures in relation to Dr. Leach. No ad hoc committee was appointed, and no physical or mental examinations were required by the Respondents. There is no indication anywhere in the record that anyone considered Dr. Leach's problems to be anything more than temporary. In fact, what evidence exists in the record shows that the Louisiana State Board of Medical Examiners in August 1987 could find no basis for restricting his license to practice medicine.

The distinction between a suspension and an expulsion is not only present in the Bylaws, but is one generally recognized at law. "Suspend", for example, has been defined as an interruption, postponement, "to discontinue temporarily, but with an expectation or purpose of resumption." *Black's Law Dictionary*, 4th Ed. 1957. Louisiana courts also recognize the temporary nature of a suspension. *Knight v. La. St. Bd. of Med. Examiners*, 211 So.2d 433, 438 (4th Cir. 1968). "Expulsion", on the other hand clearly contemplates something of a permanent nature. Black's defines expulsion as "a putting or driving out. Ejectment; banishment; a cutting off from the privileges of an institution or society permanently." *Ibid.*[3]

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[3] It bears noting that on the two appeals by Dr. Leach of his suspension from staff privileges, neither the Medical Staff Executive Committee nor the Board of Directors of the Hospital chose to modify the suspension into an expulsion from the medical staff,

Both the Respondents and the lower courts ignore the distinctions drawn by the By-laws and at law between a summary suspension of a physician's staff privileges and an expulsion of that physician from the staff. The distinction is not merely one of semantics: a suspension is a temporary removal, with the expectation of reinstatement when the reasons leading to the suspension have been resolved, whereas an expulsion is a termination of the relationship between the physician and the hospital.

After they suspended Dr. Leach in December of 1986, the Respondents, if they had chosen to do so, could have invoked the provisions of Section 1 and appointed an ad hoc committee to investigate whether Dr. Leach's permanent expulsion from the medical staff would be appropriate. They did not do so, but instead, upon being notified over eight months later that the Louisiana State Board of Medical Examiners (after a thorough investigation and hearing) found no reason to restrict Dr. Leach's license to practice medicine, unilaterally and with neither prior notice to Dr. Leach nor a hearing, notified him that the suspension had in fact been an expulsion.

It is exactly by ignoring this distinction in the By-laws and unilaterally changing the temporary suspension to an expulsion without notice to Dr. Leach and opportunity for him to be heard that the Respondents failed to follow their own previously established procedural rules. Under *Horowitz*, *supra*, the Respondents' failure to follow those rules should have weighed heavily in the judicial determination of whether or not an individual had been treated in such an arbitrary manner as to constitute a denial of due process. The lower courts have not followed the dictates of *Horowitz*, and have decided the central federal question in this case in a way in conflict with applicable decisions of this Court.

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although each body had the power under Section 2, paragraph b. to recommend modification of the summary suspension.

B. *Even if the Respondents acted properly in expelling Dr. Leach from the medical staff, they acted arbitrarily in imposing a one year moratorium on Dr. Leach's reapplication for staff privileges.* There is no provision in the By-laws which requires any specific delay before a physician who has been expelled from the medical staff can apply again for staff privileges. The Respondents can point only to the Medical Staff's Credentials Committee Handbook as the source of the one year moratorium on Dr. Leach's reapplication for staff privileges. Excerpts from the Medical Staff's Credentials Committee Handbook:

> *H. Reapplication After Adverse Finding*
>
> The Bylaws are silent as to what to do with an applicant who has received a final adverse decision regarding appointment, staff category, department assignment or clinical privilege or wishes to reapply to the Staff.
>
> As a guideline, it is suggested that such an individual is not eligible for reapplication to the Medical Staff or for the denied category, deparment, or privileges for a period of at least one year. Any such reapplication shall be processed as an initial application, and the applicant must submit such additional information as the Staff or the Board may require in demonstration that the basis for the earlier adverse action no longer exists.

The provisions quoted, however, apply by their own terms to an applicant for staff privileges who has received a final adverse decision, rejecting the application for privileges, not to a person who has been granted staff privileges, but lost them, whether temporarily or permanently.

The central argument of the Respondents as to the imposition of the one year moratorium is that by appealing his temporary suspension, Dr. Leach somehow trans-

formed the temporary suspension into a full revocation of his clinical privileges.

> "Q. Under your bylaws, if you have medical staff discipline, and your privileges or membership are revoked, that's the same as suspended, is that correct?
>
> A. No, I don't think that means the same as suspended. I think suspension upheld through the final appeal level is essentially the same as being expelled from the medical staff forever until such time as you reapply and are reaccepted. It's not revocable at that point. It's reached an irrevocable point." Deposition of Herbert Marks, p. 15.

The Respondents point to no provision of the Handbook or of the Bylaws of the Hospital which authorize the transformation of a temporary suspension into a revocation of clinical privileges nor can they do so, because none exists. Their unilateral actions in this regard, not supported by any rule or regulation of the Hospital, violate Dr. Leach's rights to due process. This is especially true when the Respondents had been informed of the finding of the State Board of Medical Examiners that no basis existed for a restriction on Dr. Leach's license.

II. The Rulings of the District Court and the Court of Appeals for the Fifth Circuit Are Directly Contrary to This Court's Decision in *Matthews v. Eldridge.*

When Dr. Leach reviewed the numerous decisions which addressed what process is due during the suspension of privileges, it became abundantly clear that due to a lack of Medical knowledge, during a Constitutional review, the Court would focus on procedural aspects of said suspension, rather than the substance for the hospital's decision. He thus decided not to pursue, in the Federal District Court, a challenge of the original suspension. The failure to raise the challenge should not be construed to

mean that Dr. Leach agreed with the resulting suspension, for in fact he found no credible basis for the suspension. However, facing the legal standard for a substantive challenge, he elected not to seek relief from the District Court. Instead, he instituted the current litigation to challenge the Constitutional adequacy of the procedures followed whereupon his temporary suspension was converted to an explusion. Dr. Leach does question whether the procedures afforded by the hospital comply with the requirements of the Health Care Quality Assurance Act of 1986, 42 USC Section 11112, which created standards for professional review actions, and when complied with, create insulation from civil liability. Dr. Leach contends that the requirements were clearly violated when he was suspended from the Medical Staff.

Assuming *arguendo*, that the Respondents properly followed their own rules and regulations, it is clear that the procedures provided Dr. Leach were themselves inadequate and thus did not afford Dr. Leach due process of law. The opinion of the Court of Appeals severely undercuts the previous opinions of this Court by giving so much deference to the hospital as to obviate any balance of the relative interests of the parties.

This Court has established a balancing test for determining what procedures are required to protect an individual from arbitrary governmental action. In *Matthews v. Eldridge*, 424 U.S. 319 (1976), this Court stated that courts must consider three factors in making this determination:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

424 U.S. at 335. This test has been applied by the Fifth Circuit in cases such as *Darlak v. Bobear*, 814 F.2d 1055, 1062 (5th Cir., 1987). Under this analysis, a court must assess two factors on the side of the individual: (1) the importance of the individual property interest at stake; (2) the extent to which the requested procedure may reduce the possibility of erroneous decision making. On the other side of the balance, the court must assess the governmental interest in avoiding the increased administrative and fiscal burdens which result from increased procedural requirements.

When applying the *Matthews* test, the Court cast the relative interests of the parties as the hospital's duty to maintain quality health care for its patients on the one hand and the burden on the appellant of reapplying for staff privileges on the other. By focusing on the validity of the procedures relative to temporary suspension of Dr. Leach's clinical privileges in December, 1986, the Fifth Circuit's opinion totally undercuts the clear mandate of *Matthews* and gives hospitals confronted with a similar situation *carte blanche* to do whatever they feel is appropriate without any regard whatsoever to the value of procedural due process safeguards for the protection of the practitioner's substantial interest.

The balance struck by the Fifth Circuit's opinion is a false one, because the opinion fails to properly identify the interests of the parties and the impact of procedural due process in protecting those interests. There is no explanation of how providing Dr. Leach notice of the change of the suspension to an expulsion and giving him the opportunity to challenge the factual underpinnings of such a change would impact upon the hospital's ability to provide quality medical care for its patients. The facts are clear that there was neither notice nor a hearing as to the decisions of the Medical Executive Committee to transform the temporary suspension into a permanent revocation of those staff privileges and to impose a one

year period during which Dr. Leach could not reapply for the privileges. The position of the Respondents, as stated earlier, that the affirmation of the Board somehow transformed the summary suspension of staff privileges into a permanent revocation of those privileges, and automatically imposed a one year moratorium on the reapplication for privileges, is not supported by either the By-laws, the rules or the regulations of the hospital. It is precisely those two actions—the decision to transform the temporary suspension into a permanent revocation, without notice and an opportunity to be heard, and the imposition of a one year period before acceptance of an application for new privileges, that violate the due process clause.

Under the *Matthews* approach, this court must first identify the private interest that is affected by the official action. The interest is that of Dr. Leach in pursuing his chosen occupation, not an insignificant interest. As Dr. Leach stated in the affidavit filed with the trial court, although he admits patients to other hospitals, East Jefferson Hospital served as the primary source of referrals for his subspecialty of gastroenterology. Thus, his ability to make a living was substantially impaired due to the conduct of the Respondents. The United States Court of Appeals for the Fifth Circuit and other courts repeatedly have held that medical staff privileges are such a valuable property interest that notice and hearing should be afforded to a person prior to termination of those rights, as well as subsequent to denial of medical staff privileges. *Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1982), and *Northeast Georgia Radiological Associates v. Tidwell*, 670 F.2d 507 (5th Cir. 1982).

The second factor to be considered is the extent to which additional or substitute procedural safeguards might reduce the possibility of erroneous decision-making. A requirement that the hospital give advance notice and an opportunity for hearing of its intention to convert a summary suspension into a permanent revocation and

an opportunity to oppose the one-year reapplication moratorium would not put so substantial a burden on the hospital as to violate the *Matthews* test. Had Dr. Leach been provided an opportunity, prior to the conversion of his temporary suspension to a revocation, he would have provided the hospital with the testimony of the three psychiatrists who had examined his fitness to practice medicine for the Board of Medical Examiners and found that his abilities were not impaired. Similarly, he would have been able to provide the hospital with evidence, *prior* to expulsion, that the State Board of Medical Examiners had found that he was not impaired.

As stated before, the Fifth Circuit has explicitly held such a hearing to be required prior to termination of medical staff privileges. *Northeast Georgia Radiological Associates v. Tidwell*, *supra*. *Tidwell* makes clear that the hospital is required to provide notice of the reasons for the proposed termination of staff privileges and an opportunity to be heard on the validity of those reasons. Those rights were not afforded to Dr. Leach.

The only argument that the Respondents make as to the efficacy of these procedural safeguards is that because a hearing had been granted as to the temporary suspension of Dr. Leach's privileges, the one year moratorium is reasonably related to the hospital's substantial duty and interest in protecting patient care and, therefore, was not arbitrary and capricious. That argument does not explain the hospital's rationale for converting a temporary suspension of a physician's privileges to a permanent revocation merely because he has appealed that suspension to the board nor imposition of the one year moratorium before he can reapply for privileges. There has been no showing that there is any connection between the appeal of a summary suspension and the fitness to practice medicine, nor can there be such a showing because the connection of the two factors is absurd. Likewise, there is no showing whatsoever between a summary suspension when that action must be taken imme-

diately in the best interest of patient care in the hospital and imposition of the requirement of a full reapplication prior to reinstatement of privileges and a one year moratorium on that reapplication.

Instead of providing Dr. Leach with an opportunity to show that the circumstances leading to the summary suspension had been removed, as due process clearly requires, Dr. Leach was required to begin anew the application process. Essentially, Dr. Leach was required to begin anew the application process as a complete stranger rather than the experienced gastroenterologist who had been on staff for ten years and had contributed substantially to the hospital's mission before his summary suspension. Dr. Leach was not allowed the opportunity to show that the basis for the suspension was no longer present. Had he been given that opportunity in September of 1987, staff privileges would have been reextended, as they were in the summer of 1988. Without proof as to the necessity of these requirements, or their connection with the summary suspension, this court must conclude that the actions of the Medical Executive Committee were arbitrary and capricious.

The third factor to be considered by this court under *Matthews* is the governmental interest in avoiding the additional administrative and fiscal burdens which would result from the increased procedural requirements considered in terms of procedural due process are not the hospital's substantial duty and interest in protecting and maintaining the quality of patient care at the hospital, but rather the hospital's interest in avoiding the fiscal and administrative burden of additional procedural safeguards. Dr. Leach did not ask for reinstatement of his privileges until May 19, 1987, over six months from the imposition of his summary suspension of privileges. Because of the arbitrary decision of the Medical Executive Committee, he was prevented from showing the Medical Executive Committee that the circumstances leading to his suspension had changed, and was further told that

the issue could not be looked at until fourteen months after his suspension, and only if he agreed to initiate a full application and comply with the new application procedure.

CONCLUSION

The opinion of the Court of Appeals for the Fifth Circuit is directly contrary to this Court's decisions in *Horowitz* and *Matthews*. By painting the dispute in terms of a disagreement over the competence of a medical practitioner, the Court of Appeals did not fulfill the requirements imposed by the decisions of this Court. The federal judiciary may not be charged with the responsibility of determining the competence of medical practitioners, but clearly it has been charged by this Court's decisions and the United States Constitution with assuring that those who have that responsibility do so in accordance with the process of law which is due to those practitioners.

The Fifth Circuit opinion, if not reversed by this Court, will seriously undermine the clear guidance given by this Court previously. Certiorari should be granted to ensure that the previous rulings of this Court will not be vitiated by the Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-3634

RICHARD E. LEACH, M.D.,
Plaintiff-Appellant,
v.

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2,
d/b/a EAST JEFFERSON GENERAL HOSPITAL, *et al.*,
Defendant-Appellee.

April 19, 1989

Appeal from the United States District Court
for the Eastern District of Louisiana

Before GEE, SMITH and DUHE, Circuit Judges.

GEE, Circuit Judge:

Facts

In December 1986, East Jefferson General Hospital summarily suspended the physician privileges of the appellant, Dr. Richard E. Leach. The physician's suspension was upheld after a hearing before the Excutive Committee of the Medical Staff and an appeal to the hospital's Board of Directors. The trial court found these actions

were taken in accordance with hospital Medical Staff Bylaws.[1]

In March 1987, after Leach allegedly continued disruptive behavior despite his suspension, the hospital's Chief of Staff, Dr. Herbert W. Marks, asked the Louisiana State Board of Medical Examiners to invoke the Louisiana Medical Practitioner's Act to determine the appellant's fitness and ability to practice medicine.

Dr. Leach asked the Medical Executive Committee to lift his summary suspension on May 19, 1987. Dr. Marks

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[1] Article VII of East Jefferson's Medical Staff Bylaws provides:

Section 2. Summary Suspension.

a. Anyone of the following: The Chief of the Medical Staff, the Chairman of a Clinical Department, the Administrator and the Executive Committee of either the Medical Staff or the governing body—shall each have the right, whenever action must be taken immediately in the best interest of patient care in the hospital, to summarily suspend all or any portion of the clinical privileges of a practioner, and such summary suspension shall become effective immediately upon imposition. The affected practitioner shall be notified by certiorari mail, return receipt requested, of the suspension and the reason thereof. However, suspended physicians must keep themselves available for consultation.

b. A practitioner whose clinical privileges have been summarily suspended shall be entitled to request that the Executive Committee of the Medical Staff hold a hearing on the matter within such reasonable time period thereafter as the Executive Committee may be convened in accordance with Article VII of these Bylaws.

c. The Executive Committee may recommend modification, continuance or termination of the terms of the summary suspension. If as a result of such hearing, the Executive Committee does not recommend immediate termination of the summary suspension, the affected practitioner shall, also in accordance with Article VII, be entitled to request an appellate review by the governing body, but the terms of the summary suspension as sustained or as modified by the Executive Committee shall remain in effect pending a final decision thereon by the governing body.

responded that the Bylaws failed to provide for review after the suspension had been affirmed by the hospital's Board of Directors. About a week later, Dr. Leach sought an outline of the procedures for again becoming an active staff member from the defendant, Peter J. Betts, who was the President and Chief Executive Officer of the hospital. The request for information was referred to the Medical Executive Committee, which informed Dr. Leach of the hospital's longstanding policy of requiring a one year moratorium for reapplication to staff membership.

The Medical Executive Committee considered the moratorium an appropriate length of time for a disciplined physician to resolve his problems. Although the By-laws do not stipulate such a moratorium, the East Jefferson Medical Staff's Credentials Committee Handbook recommends reapplication only after a period of at least one year.[2] Mr. Betts thus informed Dr. Leach that he could reapply on February 19, 1988, which was one year after the hospital Board affirmed his summary suspension.

Dr. Leach was also informed that the Medical Staff only accepts applications from physicians with licenses not encumbered by the Louisiana State Board of Medical Examiners. The State Board informed Dr. Leach in Au-

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[2] The Medical Staff's Credentials Committee Handbook states:

H. *Reapplication After Adverse Finding*

The Bylaws are silent as to what to do with an applicant who has received a final adverse decision regarding appointment, staff category, department assignment or clinical privilege or wishes to reapply to the Staff.

As a guideline, it is suggested that such an individual is not eligible for reapplication to the Medical Staff or for the denied category, department, or privileges for a period of at least one year. Any such reapplication shall be processed as an initial application, and the applicant must submit such additional information as the Staff or the Board may require in demonstration that the basis for the early adverse action no longer exists.

gust 1987, that it would not restrict his license to practice medicine. Dr. Leach then sought reinstatement and the hospital's Medical Executive Committee decided to allow him to reapply in advance of the one year moratorium since the Louisiana State Board indicated he was solving his problem.

Instead of reapplying, however, Dr. Leach filed this lawsuit. The only issue was whether Dr. Leach was deprived of the due process and equal protection of the laws guaranteed by the Constitution. The trial court granted the defendant's motion for summary judgment, determining that there were no genuine issues of material fact. We affirm.

Analysis

The appellant first argues that the hospital failed to follow its established rules and regulations. The trial court found, however, that the hospital reasonably followed its own rules in summarily suspending the appellant, and we agree. The hospital's Bylaws provided no guidance for reapplication after summary suspension, but the Committee Handbook delineated the policy of recommending a one year moratorium. The hospital clearly has a duty to protect patients and ensure their competent treatment. In addition, we note that courts are not the best fora for determining the competence of medical practitioners. As we have stated,

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. . . . The court is charged with a narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered.

Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971).

We agree with the trial court's finding that the measures employed by the hospital were reasonable. The appellant's argument that the hospital failed to follow its own rules and regulations is not supported by the record. In the one instance in which the hospital deviated from its stated policy, namely by shortening the length of the appellant's moratorium when it received evidence he was addressing his problems, it did so for his benefit. We find the appellant's argument of a due process violation unpersuasive and affirm the trial court's summary judgment on this issue.

The appellant also argues that the hospital rules and regulations were themselves inadequate to protect his constitutional interests. The argument must be evaluated in light of the United States Supreme Court's test for determining the sufficiency of procedures in safeguarding due process rights. In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Court stated that due process requires considering the following factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. at 903 (citations omitted).

The first *Mathews* factor requires consideration of the private interest that will be affected. The private interest of Dr. Leach was his medical privilege. *See Darlak v. Bobcar*, 814 F.2d 1055, 1061 (1987). This was, of course, a very important interest; but Dr. Leach was at liberty to practice medicine at other hospitals. In addi-

tion, Dr. Leach was permitted to reapply after a one year moratorium, a period of time that was later reduced by five months.

The second *Mathews* factor weighs the risk of wrongful deprivation from the procedures used against the probable value of other safeguards. As the trial court found, Dr. Leach was allowed to present any evidence he chose to bring forth, both at the hearing before the Executive Committee and the appeal before the hospital's Board. The record is devoid of any evidence that the appellant ever requested a delay in the proceedings. Nor is there any evidence that the Board acted unfairly to the appellant. The one year moratorium for reapplication was in fact shortened when the State Board informed the hospital, more than two months after the moratorium was imposed, that Dr. Leach was addressing his problems. In light of these circumstances, we are unable to say that the hospital failed to provide further necessary safeguards to protect the appellant's interests.

Finally, the hospital clearly has an interest in providing quality medical care to its patients. If a physician is disruptive or has personal problems, the hospital has a duty to intervene. *See Darlak*, *supra* at 1063. When the moratorium was imposed, both the Medical Executive Committee and the hospital Board had agreed that summary suspension was necessary. The procedural safeguards were adequate to ensure that the appellant's constitutional rights were protected.

On balance, the *Mathews* factors convince us that the hospital's duty to maintain quality health care for its patients decisively outweighs the burden on the appellant of reapplying for staff privileges. The procedures provided a "meaningful hedge against erroneous action," and due process requirements of notice and an opportunity to be heard were met. *See Goss v. Lopez*, 419 U.S. 565, 583, 95 S.Ct. 729, 741, 42 L.Ed.2d 725 (1975).

The appellant was not deprived of his constitutional rights to due process or equal protection when the hospital interpreted his summary suspension as permament revocation and imposed the one year moratorium on reapplying for staff privileges. We therefore find the trial court properly granted the appellee's motion for summary judgment and the ruling is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3634

D.C. Docket No. CA-87-4782-D
RICHARD E. LEACH, M.D.,
Plaintiff-Appellant,

versus

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2,
d/b/a EAST JEFFERSON GENERAL HOSPITAL and
PETER J. BETTS, President and Chief Executive Officer,
Defendants-Appellees.

Appeal from the United States District Court
for the
Eastern District of Louisiana

Before GEE, SMITH and DUHE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

April 19, 1989

Issued as Mandate: May 11, 1989

APPENDIX C

MINUTE ENTRY
McNAMARA, J.
AUGUST 4, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-4782

SECTION "D" (1)

RICHARD E. LEACH, M.D.

versus

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2,
d/b/a EAST JEFFERSON GENERAL HOSPITAL, *et al.*

[Filed Aug. 4. 1988]

This Minute Entry supplements the July 27, 1988 Minute Entry in which the court granted the Summary Judgment Motion of Defendants, Jefferson Parish Hospital District No. 2, d/b/a/ East Jefferson General Hospital and Peter J. Betts, President and Chief Executive Officer, and denied the Cross-Summary Judgment Motion of Plaintiff, Richard E. Leach, M.D.

I. CHRONOLOGICAL RECITATION OF UNCONTESTED FACTS

The court finds that there are no genuine issues of material fact concerning the instant litigation. On Decem-

ber 16, 1986, Plaintiff physician's staff privileges at East Jefferson General Hospital (E.J.) were summarily suspended.[1] Pursuant to procedures established in E.J.'s Medical staff Bylaws, Plaintiff's summary suspension was upheld following: (1) A hearing before the Executive Committee of the Medical Staff; and (2) An appeal before the E.J.'s Board of Directors on February 19, 1987.[2]

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[1] Despite Plaintiff's suspension from E.J., Plaintiff testified that he was still on the medical staff of several local hospitals. (See Defendant's Exhibit No. 13, pp. 3-5, Plaintiff's deposition.)

[2] Article VII of E.J.'s Medical Staff Bylaws provides:

Section 2. Summary Suspension.

a. Anyone of the following: The Chief of the Medical Staff, the Chairman of a Clinical Department, the Administrator and the Executive Committee of either the Medical Staff or the governing body—shall each have the right, whenever action must be taken immediately in the best interest of patient care in the hospital, to summarily suspend all or any portion of the clinical privileges of a practitioner, and such summary suspension shall become effective immediately upon imposition. The affected practitioner shall be notified by certified mail, return receipt requested, of the suspension and the reason thereof. However, suspended physicians must keep themselves available for consultation.

b. A practitioner whose clinical privileges have been summarily suspended shall be entitled to request that the Executive Committee of the Medical Staff hold a hearing on the matter within such reasonable time period thereafter as the Executive Committee may be convened in accordance with Article VII of these Bylaws.

c. The Executive Committee may recommend modification, continuance or termination of the terms of the summary suspension. If as a result of such hearing, the Executive Committee does not recommend immediate termination of the summary suspension, the affected practitioner shall, also in accordance with Article VII, we entitled to request an appellate review by the governing body, but the terms of the summary suspension as sustained or as modified by the Executive Committee shall remain in effect pending a final decision thereon by the governing body.

(See Defendant's Exhibit No. 7.)

On March 9, 1987, after Plaintiff allegedly continued to behave disruptively at E. J. despite his suspension, Dr. Herbert W. Marks, E. J.'s Chief of Staff requested the Louisiana State Board of Medical Examiners to consider invoking the impaired physician's act to assist Plaintiff. (See Defendant's uncontested fact #5, cited in Plaintiff's memorandum in support of Plaintiff's Cross-Motion for Summary Judgment, pp. 3-4.)

On May 19, 1987, Plaintiff requested that the Medical Executive Committee lift his summary suspension. On May 21, 1987, Dr. Marks refused Plaintiff's request, stating that there was no provision in the Bylaws for the Medical Executive Committee to review a suspended physician once the suspension had been affirmed by the hospital board. (See Defendant's Exhibit, No. 3.).

On May 27, 1987, Plaintiff requested from Defendant Peter J. Betts, President and Chief Executive Officer of E. J., an outline of the procedures necessary to become an active staff member again. (See Defendant's Exhibit, No. 4.). Betts referred Plaintiff's request to the Medical Executive Committee.

On June 17, 1987, Mr. Betts informed Plaintiff that the Medical Executive Committee reviewed Plaintiff's request and pointed out that E.J.'s long-standing policy concerning reapplication for staff membership requires a one-year moratorium.[4] (See Defendant's Exhibit, No.

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[4] E.J. Medical Staff's Credentials Committee Handbook states:

H. *Reapplication After Adverse Finding*

The Bylaws are silent as to what to do with an applicant who has received a final adverse decision regarding appointment, staff category, department assignment or clinical privilege or wishes to reapply to the Staff.

As a guideline, it is suggested that such an individual is not eligible for reapplication to the Medical Staff or for the denied category, department, or privileges for a period of at least one year. Any such reapplication shall be processed as an initial application, and the applicant must submit such addi-

6). The Executive Committee considered that this one-year moratorium was an appropriate time period for a disciplined physician to resolve his problems. (See Dr. Mark's Deposition, pp. 29-31, 42).

Mr. Betts advised Plaintiff that since the Executive Committee determined that Plaintiff's one-year moratorium began when the hospital Board ratified his summary suspension on February 19, 1987, Plaintiff could reapply on February 19, 1988. Additionally, Mr. Betts apprised Plaintiff that the Medical Staff only accepts applications from physicians holding a license to practice medicine in the State of Louisiana that is completely unencumbered by the Louisiana State Board of Medical Examiners. (See Defendant's Exhibit, No. 6.).

It was not until August 24, 1987, that the Louisiana State Board of Medical Examiners advised Plaintiff that the State Board would take no formal action against him in restricting his license to practice medicine in Louisiana. On September 9, 1987, Plaintiff's attorneys advised E.J. of the State Board's ultimate conclusions and requested Plaintiff's reinstatement. (See Defendant's Exhibit, No. 10.).

On September 23, 1987, Mr. Betts responded to the request of Plaintiff's attorneys and stated that Mr. Betts, Dr. Marks and the Medical Executive Committee determined that Plaintiff could then submit a new application and Plaintiff would be processed as a new applicant to the Staff. (See Defendant's Exhibit, No. 11.). Dr. Marks explained that the findings of the State Board of Examiners indicated that Plaintiff was resolving his problem and that a modification of the one-year moratorium was therefore warranted. (See Defendant's Exhibit, No. 14, pp. 41-43.).

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tional information as the Staff or the Board may require in demonstration that the basis for the early adverse action no longer exists.

(See Defendant's Exhibit, No. 8.).

Plaintiff never submitted an applicaiton. However, on October 13, 1987, Plaintiff filed the instant suit. The only viable issue that presently remains concerns Plaintiff's alleged deprivation of due process and equal protection of the laws as guaranteed by the Constitution.[5]

In Defendants' memorandum supporting their Summary Judgment Motion, Defendants contend that Plaintiff received all of the process that was due Plaintiff. In Plaintiff's opposing memorandum to Defendants' Summary Judgment Motion and in his identical memorandum supporting his Cross-Summary Judgment Motion, Plaintiff agrees that his summary suspension complied with requirements of due process. However, Plaintiff argues that Defendants' transformation of the summary suspension into a permanent revocation and the imposition of a one-year moratorium on the reapplication for staff privileges violated Plaintiff's due process rights because: (1) Defendants failed to follow their established rules and regulations; and (2) Even if Defendants properly followed their established rules and regulations, these rules and regulations themselves inadequately guaranteed Plaintiff's due process rights.

II. THE LAW

As to Plaintiff's first argument concerning the Defendants' alleged failure to file their established rules and regulations, the court finds that the Defendants *reasonably* followed their established rules and regulations in summarily suspending Plaintiff. Because E.J.'s Bylaws provide no specific time limitation for a summary suspension that has been affirmed on appeal by the hospital Board, a summary suspension is tantamount to an indefinite suspension or permanent revocation. Furthermore, consistent with a long-standing hospital guideline

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[5] In Plaintiff's memorandum in support of his Cross-Motion for Summary Judgment, Footnote 1, Plaintiff abandoned his second cause of action based on alleged violation of 42 U.S.C. § 1983.

which recommends a one-year moratorium for reapplication after an adverse finding, the imposition of the one-year moratorium on Plaintiff's reapplication for staff privileges was reasonably related to the hospital's substantial duty and interest in protecting patient care. Finally, the court recognizes the propriety of judicial restraint where the professional competence of a physician is concerned.

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to reply on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with a narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the Escutcheon of Caduceus.

Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971).

As to Plaintiff's second argument concerning the adequacy of Defendants' rules and regulations themselves, the court considers the three factors set forth in *Mathews*

v. Eldridge, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18, 33 (1976):

1. The private interests that will be affected by the official action;
2. The risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguard; and
3. The Government's interests, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail.

Considering the first *Mathews* factor, the court realizes that Plaintiff's suspension is a serious private interest. However, because Plaintiff could continue to practice medicine at hospitals other than E.J., he was not deprived of his livelihood. Furthermore, Plaintiff was initially allowed to reapply for Staff privileges at E.J. after a one-year moratorium, which was ultimately reduced by five months. *See, Darlak v. Bobear*, 814 F.2d 1055, 1063 (5th Cir. 1987).

Considering the second *Mathews* factor, the court finds that, at both Plaintiff's hearing before the Executive Committee and his appeal before the hospital's Board, Plaintiff was free to present any available evidence, psychiatric evaluations or otherwise, which may have had a bearing on his suspension and reapplication process. Furthermore, there is no indication in the record that Plaintiff ever requested a delay, in either his hearing or appeal, so that he could compile evidence favorable to his position. Finally, the court finds that Plaintiff's argument, that he should have been given the opportunity to present the findings of the State Board of Medical Examiners to show that the permanent revocation and one-year moratorium were inappropriate, ignores the fact that the State Board's findings were not available until

more than two months after Defendants imposed the one-year moratorium. In fact, when Defendants were informed of the State Board's findings, they readily lifted the five months remaining on the one-year moratorium and invited Plaintiff to reapply.

Considering the third *Mathews* factor, the court finds that Defendants have a clearly legitimate interest in maintaining the quality of medical care provided within its hospital facilities. *Darlak*, at 1063. When the Defendants imposed the one-year moratorium, Plaintiff's summary suspension had been affirmed by both the Medical Executive Committee and the Hospital Board. Under the circumstances, Defendants provided Plaintiff with all the procedural safeguards that were feasibly available.

Balancing the first and second *Mathews* factors against the third *Mathews* factor, the court finds that the Defendants' heavy duty to maintain quality medical care manifestly outweighs the Plaintiff's slight burden in reapplying for staff privileges. Therefore, Defendants' actions and procedures sufficiently provided a "meaningful hedge against erroneous action," and Plaintiff received all of the notice and opportunity to be heard as required by the Constitution. *Darlak*, at 1063.

Based on the foregoing, the court concludes that Plaintiff sufficiently received the Constitutional guarantees of procedural due process and equal protection when Defendants: (1) Interpreted Plaintiff's summary suspension to mean a permanent revocation; and (2) Required Plaintiff to wait one-year before reapplying for new privileges. Therefore, as a matter of law, Defendants are entitled to summary judgment and Plaintiff is not entitled to summary judgment.

* * * *

APPENDIX D

MINUTE ENTRY
McNAMARA, J.
JULY 27, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-4782

SECTION "D" (1)

RICHARD L. LEACH, M.D.

versus

JEFFERSON PARISH HOSPITAL
DISTRICT NO. 2, *et al.*

[Filed July 27, 1988]

Before the court are the Cross-Motions of Plaintiff, Richard E. Leach, M.D., and Defendants, Jefferson Parish Hospital District No. 2, d/b/a East Jefferson General Hospital and Peter J. Betts, President and Chief Executive Officer, for Summary Judgment. Plaintiff and Defendants, respectively, oppose the Motions. The Motions, set for hearing on Wednesday, July 27, 1988, are before the court on briefs without oral argument.

Having considered the memoranda and attachments of counsel and the applicable law;

IT IS ORDERED that Defendants' Motion for Summary Judgment is GRANTED and Plaintiff's Cross-Motion for Summary Judgment is DENIED. Written reasons will follow.

* * * *

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-4782

SECTION "D" (1)

RICHARD E. LEACH, M.D.

versus

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2,
d/b/a EAST JEFFERSON GENERAL HOSPITAL, *et al.*

JUDGMENT

[Filed Aug. 4, 1988]

The court having considered the entire record herein and having granted Summary Judgment in favor of Defendants by Minute Entries dated July 27, 1988 and August 2, 1988, and for reasons stated therein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Defendants, Jefferson Parish Hospital District No. 2, d/b/a/ East Jefferson General Hospital and Peter J. Betts, President and Chief Executive Officer, and against Plaintiff, Richard E. Leach, M.D., dismissing Plaintiff's Complaint with prejudice and at Plaintiff's costs.

New Orleans, Louisiana, this 4th day of August, 1988.

/s/ Judge McNamara
United States District Judge

APPENDIX F

EXCERPT FROM

EAST JEFFERSON GENERAL HOSPITAL MEDICAL STAFF BYLAWS

ARTICLE VII: CORRECTIVE ACTION

Section 2. *Summary Suspension*

a. Anyone of the following: the Chief of the Medical Staff, the Chairman of a clinical department, the Administrator and the Executive Committee of either the Medical Staff or the Governing Body—shall each have the right, whenever action must be taken immediately in the best interest of patient care in the Hospital to summarily suspend all or any portion of the clinical privileges of a practitioner, and such summary suspension shall become effective immediately upon imposition. The affected practitioner shall be notified by certified mail, return receipt request, of the suspension and the reason thereof. However, suspended physicians must keep themselves available for consultation.

b. A practitioner whose clinical privileges have been summarily suspended shall be entitled to request that the Executive Committee of the Medical Staff hold a hearing on the matter within such reasonable time period thereafter as the Executive Committee may be convened in accordance with ARTICLE VIII of these Bylaws.

c. The Executive Committee may recommend modification, continuance or termination of the terms of the summary suspension. If, as a result of such hearing, the Executive Committee does not recommend immediate termination of the summary suspension, the affected practitioner shall, also in accordance

with ARTICLE VIII, be entitled to request an appellate review by the Governing Body, but the terms of the summary suspension as sustained or as modified by the Executive Committee shall remain in effect pending a final decision thereon by the Governing Body.

d. Immediately upon the imposition of a summary suspension, the Chairman of the Executive Committee or a responsible departmental chairman shall provide for alternative medical coverage for the patients of the suspended practitioner remaining in the Hospital at the time of such suspension as stated in ARTICLE VI, Section 2. e.